BLANK PAGE

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 14.

REPUBLIC STEEL CORPORATION,
Appellant,

v.

NATIONAL LABOR RELATIONS BOARD AND
STEEL WORKERS ORGANIZING COMMITTEE,
Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF OF REPUBLIC STEEL CORPORATION, APPELLANT.

LUTHER DAY,
1759 Union Commerce Bldg., Cleveland, Ohio,

THOMAS F. PATTON,
Republic Bldg., Cleveland, Ohio,

JOSEPH W. HENDERSON,
Packard Bldg., Philadelphia, Pa.,

MORTIMOR S. GORDON,
120 Broadway, New York, N. Y.,
Attorneys for Appellant,
Republic Steel Corporation.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

BLANK PAGE

INDEX.

STATEMENT 1

ARGUMENT: The Provision for Reimbursement of Work Relief Funds is Not Within the Board's Power 2

A. To Require Petitioner to Reimburse the Fiscal Agencies Will Not Effectuate the Policies of the Act 2

B. The Reimbursement Provision Is Not Remedial, But Is Punitive 7

C. The Board Could Not Properly Hold that the Employee's Rights to the Amounts of the Work Relief Payments Are Superior to Those of Appellant, and Could Not Properly Require That the Employee Reimburse the Governments 11

(1) The Board could not properly decide that the employees were entitled, as against appellant, to the amounts of work relief payments 11

(2) The Board could not properly require that the employees reimburse the governments .. 14

D. Discussion of Appellant's Other Objections to the Reimbursement Order 15

Table of Authorities.

National Labor Relations Board v. Leviton Mfg. Co., Inc. (C. C. A. 2) 111 Fed. (2d) 619 ..... 7, 9

National Labor Relations Board v. Tovrea Packing Company (C. C. A. 9), 111 Fed. (2d) 626 5

McCormick on Damages (1935), page 146 12

National Labor Relations Act, Section 10 (c) 5, 14

Fourth Annual Report of the National Labor Relations Board (1940), page 99 8

BLANK PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 14.

REPUBLIC STEEL CORPORATION,
Appellant,

v.

NATIONAL LABOR RELATIONS BOARD AND STEEL WORKERS ORGANIZING COMMITTEE,
Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF OF REPUBLIC STEEL CORPORATION, APPELLANT.

STATEMENT.

For the convenience of the Court, this brief will follow the outline of the brief for the National Labor Relations Board.

As to the suggestion that the petition for certiorari contains no specification of errors, we fail to see why this matter has been called to the Court's attention because counsel for the Board agree that no specification of errors was necessary due to the fact that no brief was filed in support of the petition for certiorari. Of course, the specification of errors would merely have been a repetition, in slightly different language from the "questions presented." We are not advised of any uncertainty among the profession as to the rule, and see no reason for decision of the point in this case since the writ has already been allowed.

As a general proposition, we are impressed with the fact that the Board seems to attempt to create the impression that, as a result of the payments received by employees for work performed upon work relief projects, "a fund" has been created as a "sort of windfall" (brief, page 18) which it was necessary for the Board to administer (brief, page 19), and that the Board, like the Court of Appeals reviewing its order could "adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action"; in other words, that it could in effect administer this fund like a court of equity. There is no "fund" involved in this case. The employees received payment for their work on the work relief projects and, presumably, have spent this money. The decree of the court below, in this respect, was not different from that portion of its decree which ordered back pay. It has created a liability against the appellant which must be paid out of the appellant's pocket. There is no question of the administration of a fund as between appellant, the governments supplying funds for work relief projects, and the employees who worked on them.

ARGUMENT.

THE PROVISION FOR REIMBURSEMENT OF WORK RELIEF FUNDS IS NOT WITHIN THE BOARD'S POWER.

A. To Require Petitioner to Reimburse the Fiscal Agencies Will Not Effectuate the Policies of the Act.

An examination of the first three paragraphs of this section of the Board's brief (pages 11 to 13) immediately demonstrates that the Board's counsel are under a misconception as to its basic jurisdiction to order affirmative action. It is stated that an affirmative order of back pay accomplishes two purposes, namely, first, it compensates the employee, and second, "more important in effectuating the policies of the Act" it operates as a "substantial deterrent to employer violation." (brief, page 12.) Upon the basis of the latter alleged purpose, as a thesis, is based the proposi-

tion that unless governmental agencies which assume the burden of supporting the employees who were out of work are reimbursed then funds so used "will be converted to the subsidization of unfair labor practices," and therefore, employers will not be deterred.

As pointed out in our main brief, this Court has decided the jurisdiction of the Board to order affirmative action is purely remedial. Remedial action may operate as a deterrent but the Board has no jurisdiction to order action which will operate as a deterrent but which is not remedial. Therefore, when the Board argues that it is entitled to order reimbursement of work relief agencies because this will tend to deter unfair labor practices, it is attempting to sustain this order upon the basis of jurisdiction to order other than remedial action—a jurisdiction which this Court has said the Board does not have.

The Board argues in the fourth paragraph of this section (brief, page 13) that the order here in question effectuates the policies of the Act much as does the back pay order. It argues first, that if the employer is permitted to deduct amounts of work relief payments for back pay, the deterrent effect of the order is substantially diminished. As seen above, this is not a sound argument in support of the validity of the order, since the Board has no jurisdiction to make an affirmative order merely because it will deter violation of the Act. It is urged, second, that the order is merely remedial because it seeks to restore the innocent parties, "both the employees and the fiscal agencies" to their status quo. This argument gives no consideration to the fact that the governments supplying the funds for work relief projects to whose fiscal agencies payments are ordered made, have received the benefit of the work done by the employees upon the projects, and, therefore, to the extent that these payments represent compensation for value received, would be placed in a much better position than they would have occupied if the unfair labor practices had not occurred.

The sixth, seventh and eighth paragraphs of this section (brief, pages 14 to 16), are devoted, first, to an attempt to answer our proposition (brief, pages 14, *et seq.*) that this order will tend to encourage and foster strikes by giving strikers a more desirable status with the work relief projects, and, second, to an argument that, on the contrary, this type of order will effectuate the policies of the Act by encouraging work relief projects to employ persons who are unemployed as a result of unfair labor practices and thus protect the rights of the employees under the Act.

As to our argument, it is true that the Board generally denies back pay to employees for periods during which they are voluntarily on strike. However, it must be obvious that, as in the case at bar, strikers are given back pay by the Board's order for periods during which they are not reinstated in obedience to the Board's order. Thus, if the employer, not being satisfied with the correctness of the Board's order, appeals the case, and does not in the meantime make the case moot by complying with the Board's order, fiscal agencies of work relief projects employing the strikers involved stand a chance of being reimbursed for payments made to them for work performed at least from the date of the Board's order, which may be years prior to final disposition of the case, as in the case at bar. Certainly, work relief projects will be inclined to favor strikers to the extent that they are liable to be reimbursed for payments made to them covering periods subsequent to the order of the Board.

With regard to the Board's argument in this respect, namely, that this order is valid because it will tend to cause work relief projects to employ persons who have become unemployed as a result of unfair labor practices, and thus give aid and comfort to such employees, an entirely different situation is presented. The Board is given power to order "such affirmative action, including reinstatement of employees with or without back pay as will effectuate

the policies of this Act," Section 10(c)). A fair and liberal interpretation of this power is that, in so far as rehabilitation of employees is concerned (as distinguished from non-recognition of dominated unions, etc.), it is limited to reinstatement of employees with or without back pay, with the incidents necessary to accomplishment of these fundamental purposes. If it is not so limited, and if, as the Board contends "nothing in the language of § 10(c) limits affirmative relief to action which will directly or immediately benefit employees by restoration of their status quo" (brief, page 16) then the Board has jurisdiction to order the employer to do practically anything which it believes will remedy the situation of an employee whose employment has ceased as a result of his unfair labor practices. For example, the Board could order the employer to invest money in the business of a third party in the hope that by expanding the third party's business the discharged employee might obtain employment. This would not differ substantially from the effect on the employee of the order in the present case. Can the Board make an order on the basis that it tends to indirectly influence or produce action by others than the employee and the employer which will indirectly benefit the employee in order to effectuate the policies of the Act? This is what the Board here contends. If such action is within the Board's power, then the inclusion by Congress in Section 10(c) of a specific reference to reinstatement of employees with or without back pay is without significance.

In this connection, we again respectfully refer the Court to *National Labor Relations Board v. Tovrea Packing Company* (C. C. A. 9), 111 Fed. (2d) 626, in which the court held that "the discretion conferred upon the Board is limited to the point of whether an order for back pay would do more towards effectuating the purposes of the Act than to omit it—or possibly than an order for payment of part thereof" but that the Act did not "authorize the Board to go outside of the statute and prescribe its own co-

ercive measures in aid of 'effectuating' the purposes of the Act."

The ninth paragraph of this section (brief, page 17) argues that since the Act is for a public, not private, purpose, reimbursement of public agencies which have paid out work relief payments to employees comes within the Board's power to protect these public interests. It is urged that back pay and reinstatement are not mere private rights of action, but remedies of a public nature, and the same is true of reimbursement of work relief agencies. This, of course, is a *non sequitur*. The mere fact that an act is passed to protect interstate commerce, a public concern, and that remedies of a public nature are conferred in connection with it, does not increase the jurisdiction of the instrumentality created to administer the act beyond that specified in the enabling statute. Back pay and reinstatement, as previously stated, are specifically provided for in the Act, while reimbursement of public work relief agencies is not provided for. The fact that reimbursement of work relief agencies would be a remedy of a public nature does not supply its omission from the Act. Reparation of the so-called "injustice" resulting from "the burden of economic dislocation" allegedly placed upon the work relief agencies as a result of unfair labor practices does not, in any event, come within the public purpose for which the Board was created, which is to prevent interference with interstate commerce resulting from labor disputes. The Act protects the rights of employees, alone, for this purpose. It is not intended to remedy results of unfair labor practices which do not affect employees.

In the tenth and eleventh paragraphs of this section (brief, page 17) the Board asserts that the remedies which it may utilize "*in the enforcement of the Act are in their nature equitable.*" The Board does not exercise powers similar to that of an equity court. It is a fact-finding body, and its order has no operation and effect until enforced, upon request of the Board, by a Circuit Court of Appeals.

Therefore, to suggest that the Board's power to effectuate the policies of the Act should not be "narrowly" construed because its power, "like that of the court's in reviewing its orders" is equitable, is to urge that the Board, in making its orders, may take into consideration broad equities rather than merely the question of whether or not certain action will effectuate the policies of the Act, which is its sole function.

The argument that because the Board was competent to decide that an amount equal to work relief payments should be deducted from normal wages in determining back pay, it was competent to decide that these amounts should be paid to the work relief agencies, is, of course, a complete *non sequitur*. Although this statement is blandly made, it is apparent from the face of it that these matters are not interdependent.

B. The Reimbursement Provision Is Not Remedial, But Is Punitive.

A large part of this section of the brief, the first to seventh paragraphs, inclusive, (brief pages 19 to 24) is devoted to a detailed exposition of the nature of WPA, and the purport is that WPA, and other similar work relief projects, are more in the nature of relief than work, and that, therefore, the government suffers some loss in connection therewith.

This seems to be at variance with the views of the court in *National Labor Relations Board v. Leviton Mfg. Co., Inc.* (C. C. A. 2) 111 Fed. (2d) 619, in which the court, after undoubtedly duly considering similar arguments by the Board, said:

> "However, the whole administration of 'work-relief' was conceived in a spirit exactly the opposite of charity; the very purpose of it was that the employees should understand themselves not to be the objects of charity, but to be performing work of a value equal to what they received. As the case stands,

therefore, there is no more reason why the company should be compelled under the guise of restitution, to subvene the public enterprises on which Levine worked, than if these had been the ventures of a private capitalist."

It is also at variance with the Board's statement in its Fourth Annual Report (1940), page 99:

> "Since the Board seeks to make whole employees who have been discriminated against by payment to them of a sum of money equal to that which the employees would normally have earned had the unfair labor practices not occurred, *the amounts earned* elsewhere during the period of discrimination are excluded from the sum to be paid. If, however, these amounts are earnings which the employee would have made while in the employ of the respondent, no deduction will be made. Upon the same principle, the Board has held that the net earnings to be deducted from back pay should be computed on the basis of total earnings less the expenses incident to the seeking of new employment, such as transportation costs. *Work-relief payments as earnings are properly deductible from the amount of back pay required to make a discriminatorily discharged employee whole.* The Board has held, however, that to permit the employer to retain such amounts would place the burden of the employer's unfair labor practices upon governmental relief agencies, and has therefore required employers, in deducting such amounts, to pay them over to the work-relief agency which supplied the funds for the project upon which the employee worked."

However, assuming for the sake of the argument the truth of the Board's thesis, what is the legal result? Certainly, counsel will not urge that people working on work relief projects do not produce *any* value by their efforts, and that such projects are purely or even predominantly charitable in nature. If the governments furnishing funds for these projects receive some value for services performed, then to the extent that they are reimbursed for payments made in exchange for such value, the appellant is penalized.

There is no evidence in the record in this case which shows that work relief agencies sustain any loss, or if so, how much loss they sustain, or sustained in the case at bar, as the result of paying the employees covered by the order for work performed upon work relief projects. As stated in *National Labor Relations Board v. Leviton Mfg. Co., Inc.*, (C. C. A. 2) 111 Fed. (2d) 619, 621:

> "The Board itself has always deducted from the wages to be recovered what the employee may have earned meanwhile, and it is impossible to see how it could have done less, whatever may be proper as to what he could have earned by reasonable efforts, but did not. His receipts may be of three kinds: Wages from a private employer; wages from a public agency; alms or a dole. As to the first, the Board has never suggested that the employer must pay to another private employer what that employer paid to the employee, and obviously, that would be absurd. Since the order speaks of 'monies received * * * for work performed,' we need not consider alms, or a dole. *'Monies received * * * for work performed' may be no more than a fair return for services rendered, or they might have been deliberately made higher, the margin being dole; and the record at bar does not contain any evidence on the point. At most, any such provision would have to be confined to such a margin*[1]; we do not suggest that even then it would be valid."

While the Board has made some attempt to answer our proposition that the work relief projects did not sustain loss because they received value of money paid as wages for work performed, it would appear counsel have misconceived altogether our second proposition on this point, although it is difficult to believe that we did not make ourselves reasonably clear in presenting it in the main brief. This point, discussed in the main brief, pages 15, 16, is substantially, that in order to make appellant responsible for

---

[1] Emphasis in quotations throughout is ours unless otherwise noted.

any loss resulting to work relief projects in this connection, it must appear that appellant's unfair labor practices caused unemployment, rather than natural causes, but that if natural causes did not intervene, or would not have intervened, it must be assumed that a position at appellant's plant left open by cessation of employment of an employee covered by the order was filled by someone who otherwise would have been working on a work relief project so no loss could result. Counsel refer to our "speculation" that if appellant's employee had not been employed by the work relief projects other persons would have been, and assert that since it was the purpose of the projects to provide subsistence for these people the governments sustained loss to this extent. They thus attempt to make our argument appear as though we were merely claiming that if our employees had never worked on WPA someone else would have, which, obviously, is not the argument at all. No answer is, or could be, made to our point.

In conclusion on this point, regardless of whether WPA or other work relief projects operate with the same eye to cutting costs and producing profits as does private business, nevertheless the employee is assumed to give value for what he receives. Therefore, it is difficult to conceive how the government sustains loss by the taking on of additional employees on a work relief project. However, it must be conceded that, in any event, only a part of the payments made by work relief projects for work performed constitute loss to the government, and that to the extent that such payments do not constitute loss, but payment for value received, any order requiring reimbursement of the governments supplying funds for the work relief projects confers upon them a gratuitous benefit and is, therefore, penal to this extent.

C. The Board Could Not Properly Hold that the Employee's Rights to the Amounts of the Work Relief Payments Are Superior to Those of Appellant, and Could Not Properly Require That the Employee Reimburse the Governments.

The general proposition sought to be sustained in this section of the Board's brief is that the Board was not required to deduct an amount equal to payments received for work performed on work relief projects by the employees covered by the order, in arriving at the amount of compensation to be paid them for loss of pay, but, instead, could have required these employees to reimburse the fiscal agencies of the governments furnishing the funds for the work relief projects; that the Board in effect, took a shortcut by deducting these amounts from payments to employees requiring appellant to make the payments to the fiscal agencies.

We submit that both of the fundamental propositions are unsound, and that, therefore, the Board had no power or jurisdiction to take the shortcut.

(1) The Board could not properly decide that the employees were entitled, as against appellant, to the amounts of work relief payments.

The first three paragraphs of this subsection (brief, pages 28 to 30) are devoted to an exposition of the common law relating to the measure of damages for loss of earnings. We may concede, for the sake of the argument, that the law is as therein announced, although shortness of time makes detailed examination of the authorities cited impossible. We may also concede, for the sake of the argument, that, as stated in the fourth paragraph of this subsection (brief page 31) "The measure of the wrong is the value of the opportunity denied * * *," and that the employer is not to be given the benefit of gratuitous assistance from third persons, or other benefits secured by the employees by prior expenditures or foresight, such as insurance or strike bene-

fits. In fact, conceding for the sake of argument, the truth of everything stated in the first four paragraphs, it does not follow that it lay in the discretion of the Board to deduct or not deduct payments received from work relief projects, *and this is so regardless of whether such payments are considered to be earnings or charitable relief.*

Why is a distinction made between earnings received by an employee, wrongfully discharged, from other employment, and gratuities received from third persons or benefits for which the employee is paid contingent upon unemployment, from the standpoint of deduction from the gross amount of pay due the employee? Both result from unemployment, yet earnings are deducted, and the other receipts are not. The reason for deduction of earnings is stated in *McCormick on Damages* (1935) as follows, page 146:

> "40. Where the defendant's wrong or breach of contract has not only caused damage, but has also conferred a benefit upon plaintiff (such as saving of expense of performance *or making available an opportunity to dispose of* goods or *services*) which he would not otherwise have reaped, the value of this benefit must be credited to defendant in assessing the damages.
>
> "Closely akin to, but not entirely identical with, the doctrine of avoidable consequences, is the principle that, in arriving at damages for defendant's wrongful conduct, if any benefit or opportunity for benefit appears to have accrued to the plaintiff by reason of defendant's breach of duty, a balance must be struck between benefit and loss, and the defendant should be charged only with the difference—the net loss. * * *
>
> "It is constantly applied in contract cases as a necessary corollary of the fundamental canon that the damages, as near as may be, should be such as will put the plaintiff in the position he would have been in if the contract had been fully performed. * * *
>
> "Finally, the most obvious and frequent instance of the application of this principle is in cases of contracts

> of one person to devote his personal services *exclusively* for all or part of his time during a given period to a certain employment for another. *When the employer wrongfully terminates the service and is sued therefor by the person employed, the latter must give credit for what he earned elsewhere, or with reasonable diligence might have earned elsewhere, during the contract period. But for the breach, plaintiff could not have secured the other employment.*"

Since the foregoing rule is the basis of deduction of earnings, it is apparent that regardless of whatever work relief payments are called—whether a dole or earnings—they must be deducted from normal wages because termination of employment of the employees covered by the order was necessary to the receipt of such work relief payments—this, because if these employees had continued to work for the appellant, they obviously would not have had time to work on the work relief projects, *and such work was a condition precedent to receipt of work relief payments.* As stated in *McCormick, supra,* "but for the breach (unfair labor practices),[2] plaintiff (the employees) could not have secured the other employment."

Since, as a matter of law, work relief payments must be deducted because, under the basic theory of work relief they could be obtained only as a result of work, and the work could not have been performed unless employment had ceased as a result of appellant's act, the contention advanced in the fifth paragraph of this subsection (brief, page 31) to the effect that it was for the Board to decide whether work relief payments resemble more closely earnings or a dole is untenable. This question becomes immaterial.

---

[2] Matter in parentheses is ours.

(2) The Board could not properly require that the employees reimburse the governments.

Under this subsection (brief, page 33), it is argued, in substance, that the employees who received work relief payments ought to reimburse the work relief agencies because receipt of back pay has enabled them to do so without "net loss to them," that therefore, the work relief agencies are subrogated to the rights of the employees to receive the portion of their back pay represented by the amount deducted on account of work relief payments, and that the Board has power to give effect to this subrogation.

Of course, the Board did not do this. A discussion of what the Board might have done is scarcely applicable to an attempt to defend what the Board actually did. However, a complete answer to this whole contention is that the Board has no power whatever under Section 10 (c) of the Act to make an order requiring affirmative action by any one *except a person found to have been guilty of an unfair labor practice.* Section 10 (c) provides, in part, as follows:

> "* * * If upon all the testimony taken the Board shall be of the opinion that *any person named in the complaint has engaged in or is engaging in any such unfair labor practice,* then the Board shall state its findings of fact and shall issue and cause to be served on such person *an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.* * * *"

How can it be asserted that, under this provision, which embraces all of the jurisdiction of the Board to order affirmative action, the Board could order the employees, *who did not commit unfair labor practices,* to reimburse the work relief agencies?

Obviously, the whole argument under this section of the brief fails if the above proposition is conceded, as it must be, since, even if the Board had the right not to deduct payments received for work performed upon work

relief projects from normal wages in ordering back pay, which we deny, *nevertheless the Board did deduct it.* But, if the Board had no power to require the employees to reimburse the work relief projects, and, therefore, no right of subrogation against the appellant for amounts expended on behalf of the employees, based upon a right against the employees enforceable by the Board, accrued to the governments fostering work relief projects, then the Board had no power to give effect to any such right.

D. Discussion of Appellant's Other Objections to the Reimbursement Order.

The Board's discussion of the above points (brief, pages 34 *et seq.*) adds nothing to what has not already been anticipated in our main brief previously discussed herein.

However, reference should be made to paragraphs 4 and 5 of this section (brief, pages 35, 36), in which counsel go outside of the record to tell the court how this portion of the order is being administered by the Board. Of course, the decree in the case at bar makes no provision for investigation or action by the Board for the purpose of determining to what agencies payments shall be made or seeing to it that these agencies accept payments. Even if, as counsel state outside the record, the Board is undertaking this work, plenty of investigation by the appellant obviously will be necessary for the purpose of determining whether its rights are being adequately protected.

Respectfully submitted,

LUTHER DAY,
THOMAS F. PATTON,
JOSEPH W. HENDERSON,
MORTIMOR S. GORDON,

Attorneys for Appellant,
Republic Steel Corporation.